

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE FACEBOOK)
CONSUMER PRIVACY USER)
PROFILE LITIGATION)
-----)

) Case No. 18-md-02843-
) VC-JSC

This document relates to:)
)
ALL ACTIONS)
-----)

REPORTER'S VIDEOCONFERENCE
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. DANIEL GARRIE
Wednesday, January 19, 2022

Reported by:
JOANNA BROADWELL
CSR No. 10959
Job No. 5032584
PAGES 1 - 47

Page 1

1 special master's ruling?

2 MR. SWANSON: Correct.

3 THE COURT: Or you are at an impasse. All right.
4 RFPs 27, 29 on redactions related to Tyler King. Is
5 there a way to mediate that?

6 MR. SWANSON: We haven't discussed these
7 specifically with Plaintiffs. It came up in
8 Mr. Springer's email earlier this month. And I think it
9 is possible. We disagree that the information that it
10 is suggested be redacted, should be redacted.

11 MR. SNYDER: Mr. Garrie, we had asked for this
12 conference initially. And I think the way this
13 conference began is illustrative of why we asked for the
14 conference. It was not to -- obviously you have the
15 absolute right to raise any issues and conduct it
16 obviously as you determine appropriate.

17 We had asked for this conference not to discuss
18 individual discovery issues that are not yet ripe, many
19 of which are in Defendant's agenda to you, but for a
20 broader -- what we think is a much more important
21 reason. So --

22 THE COURT: I am just doing the housekeeping.

23 MR. SNYDER: Yeah, but that is our point. The
24 housekeeping is our point. And whenever I can be heard,
25 you know, it has to do with the overall conduct and

1 our productions are deficient. It is that the
2 allegations in this case are codified. They're clear.
3 And at this pace, in this process with you, Mr. Garrie
4 and the plaintiffs, the plaintiffs are doing what
5 plaintiffs rarely do, which is they have no interest in
6 a substantial completion discovery date.

7 They're going to say it is because we are hiding
8 documents, blah, blah, blah, blah, blah. It is
9 nonsense. They don't have a winning case now. When we
10 move for summary judgment, when we move for class cert
11 they're going to lose. They know that.

12 MR. LOESER: Is that helpful, Special Master
13 Garrie?

14 MR. SNYDER: Excuse me, excuse me, excuse me.
15 When Mr. Loeser when you did that last time Judge Corley
16 ordered you not to --

17 THE COURT: Counsel Snyder, Counsel Snyder,
18 Counsel, Counsel, one second.

19 MR. SNYDER: It is always Mr. Loeser who starts
20 with the name-calling, every hearing.

21 THE COURT: Counsel Snyder, Counsel Snyder. Let
22 me say for everybody, please address your arguments to
23 me and just curb your comments until one side is
24 finished. If I have questions I will do my best not to
25 interrupt, but direct your arguments to me.

1 Counselor Snyder?

2 MR. SNYDER: The problem we're having, we've been
3 mired in the document discovery dispute since November
4 of 2019 before the pandemic began. We need, we are
5 entitled to, and the Court will expect finality in the
6 conclusion to the document discovery process. Without
7 that this process, as we have said in our last appeal,
8 is not only going to up-end the schedule but will turn
9 this discovery process into an iterative ongoing
10 multiyear, beyond today project. That's where we are
11 heading.

12 And the reason we're heading from, the reason
13 we're heading there is because right now they cannot
14 defend their case on the merits. So they do not want --
15 usually plaintiffs want to end discovery and get to
16 trial. They don't want the clock to end. And so right
17 now with what they're asking us to produce, document
18 discovery will go through calendar year 2022. That is
19 the logical consequence of what they're asking for.

20 They're fine with that, and they defend it by
21 saying we're hiding documents. We need to do four
22 things, we think, to keep the case on schedule. Right
23 now we have a schedule that brings the close of all
24 discovery June. And until and unless Judge Chhabria
25 changes that schedule, which I think he would be loathe

1 to do, we need to have this process proceed in
2 conformity with the schedule. And the process is now a
3 runaway train where the schedule will be impossible,
4 impossible, to honor.

5 So there are four ways that we believe this
6 process can and should facilitate honoring and
7 compliance with Judge Chhabria's scheduling order. Yes.
8 The first is to stop re-litigating disputes that you and
9 Judge Corley already decided and agreements were
10 reached. We're having a tremendous amount of trouble
11 moving forward because at every opportunity they reopen
12 past wounds. Search string issues, we have 30 new
13 RFP --

14 THE COURT: Counselor Snyder, I understand and
15 appreciate your frustration. And are you referring to
16 the one, two, three, four that you identified in your
17 joint agenda?

18 MR. SNYDER: Yes, Your Honor. This case -- I
19 have never seen a case like this. This case is out of
20 control. The plaintiffs will not stop. We just got 30
21 RFPs that expanded on 60 that we have, 30 new RFPs that
22 are broader versions of the 60 we spent two years
23 negotiating. This will not stop unless you stop it.
24 This will not stop unless you stop it. And if you don't
25 stop it --

1 THE COURT: Counselor, I understand. I hear you.

2 MR. SNYDER: Let me just finish. If you don't
3 stop it, and you are the boss, we have two remedies. We
4 can appeal it or we can do what we're going to say when
5 we are before the Judge. Judge, if you want this case
6 to go on another two years in fact discovery, there are
7 no facts that they can get where they will win the case.
8 We may then just be delayed by two more years.

9 But Judge, this discovery process ain't going to
10 end by June of 2020 because we think the special master
11 process has been -- I am not going to use a bad word --
12 has been converted into -- by the plaintiffs into this
13 roving, ongoing, every month they get to send us another
14 30 or 40 or 60 requests. In my experience judges or
15 master special judges say no mas, no mas. You are done.

16 THE COURT: Nobody has made any request for no
17 mas on either side. But I hear you. So I appreciate
18 your position, and I do want to hear from Plaintiff. I
19 mean, both parties, and I have told both sides here,
20 feel free to make motions for fees if you feel it is
21 unduly burdensome, if you think it is unreasonable. You
22 have to ask for relief for the relief to be granted. I
23 can't sue sponte. I don't feel comfortable sue sponte
24 saying no more X, Y, Z or A, B C, because frankly I
25 didn't know about the brand-new RFPs you just got or

1 those things you were just alluding to.

2 So I am more than happy if you want to bring a
3 motion or raise the issue and so on and so forth to hear
4 it. And I understand and appreciate your frustration,
5 but ultimately Judge Corley and Judge Chhabria are the
6 ones you are going to have to go to. And I appreciate
7 both sides' perspectives here, and I am going to hear
8 from Plaintiff on it. And I appreciate it.

9 MR. SNYDER: He just ordered us to turn over
10 documents that will take us a year to turn over. How is
11 that process consistent with the schedule? I do think
12 that this process should be informed by the overarching
13 schedule. And if we now have to produce and search for
14 and produce every ADI communication, quote, unquote,
15 that is going to take a year with hundreds of lawyers.
16 And if that's what you intend -- just illustratively.

17 And there is no sense in this process that there
18 is a scheduling order that is a federal court order that
19 we have to comply with that we can't comply with because
20 June 30th is a couple of weeks away, and they just sent
21 us 30 new RFPs.

22 MR. LOESER: That is actually not true.

23 THE COURT: Counselor Loeser, one second.

24 With the ADI I think I provided further
25 clarification to counsel Kutscher-Clark around that.

1 And feel free to ask for further clarification. It is
2 not my intention for you to search everywhere for
3 everything for those communications. It's just a search
4 for what the existing custodians -- what Judge Corley
5 has said, like, should be provided to the parties.

6 And I should have -- I recognize I should have
7 put in that my --

8 MR. SNYDER: I am not intending to raise any
9 specific issue today. I think what I am asking --

10 THE COURT: Okay.

11 MR. SNYDER: -- is how can we all -- how can we
12 work in this process within the scheduling order that is
13 operative. And if the plaintiffs say that that order is
14 no longer operative because we have been criminal in our
15 document production and scofflaws in our document
16 production, and they are going to tell Judge Chhabria
17 that they need another six months until we come into
18 compliance for our documents, at least we know what the
19 plaintiff's game is.

20 But we're operating in a make-believe world where
21 they have dozens and dozens of documents issues that
22 have no -- there is no end even in sight. And I am not
23 on top of these issues. My team is. But they tell me
24 that we're nowhere near close to the end. But the end
25 is Friday or next Friday.

1 MR. LOESER: I guess Ms. Kutscher-Clark would
2 have to be more specific. There is -- oftentimes they
3 claim a production request isn't specifically enough to
4 cover some issue. And so we're asked to provide another
5 one. I don't know what Mr. Snyder is talking about with
6 all these new requests. The last RFPs were August 30th.

7 THE COURT: Okay. So before we get into the
8 weeds of the RFPs and the other things, there is two
9 general guiding principles. A, I agree on efficiency,
10 and I do agree on not having to reinvent the wheel.
11 With that said, both sides can make motions for fees or
12 for something to remedy the situation.

13 The parties agreed to a process to mediate before
14 you brought it before the special master. And little
15 did I know there would be so many issues. Because if I
16 did I certainly wouldn't have made it the process I did
17 at the time. But we are where we are. And frankly,
18 like with the RFPs or with the privilege log which is a
19 great example, the parties agreed to a privilege
20 protocol. And the net/net is you negotiate, is you
21 negotiate it, you agree to it, and you should follow it.

22 If you don't think it is appropriate or will
23 apply, then make a motion to seek relief to have it
24 modified. And if there is a compelling reason for it to
25 be modified state such. But, you know, it's going to

1 have to be pretty compelling, to be very frank about it,
2 because as both sides point out, you have been at this
3 for several years, right?

4 But that is different than the ADI and the other
5 things that I had the chance to read Judge Corley's
6 orders on, right, with regard to those things. But I
7 mean -- and I appreciate your position, and, I mean,
8 frankly -- and I see your point, Counsel Kutscher-Clark.

9 But I think with specificity will come -- because
10 I actually read the RFPs, and I wasn't aware as to
11 what -- and I actually had to go through and print off
12 all sets to figure out and dates, right, because there
13 are five sets of RFPs with different dates, and looking
14 at them and I understand your position, and they were, I
15 believe, indeed served in August, if that is correct, I
16 believe at some point. And there is back and forth.

17 And I am happy to make rulings, but they need to
18 be brought before me for me to put them to bed. But
19 without you raising the issue I can't do a whole lot
20 with it. I can't sue sponte, unfortunately. I don't
21 have the same authority as Judge Chhabria or Judge
22 Corley that sue sponte can say, you know, say no more of
23 this, no more of that, right?

24 MS. WEAVER: If I may be heard, I haven't yet had
25 an opportunity. I would like to propose we can maybe be

1 think that would be incredibly constructive, and we
2 could just get ruling from you that could help guide how
3 to make decisions and what to raise and what not to
4 raise.

5 But we would just like to move through this.
6 There is a lot to do. There is a lot to do and a lot of
7 complex cases, we're all capable as lawyers of refining
8 these issues and accepting your rulings so we can move
9 forward. We think we could that here.

10 MS. STEIN: Respectfully, one of the --

11 THE COURT: Everybody is talking.

12 Counselor Snyder, the floor is yours.

13 MR. SNYDER: Let me just say one thing. Here is
14 the problem. And maybe we do a lose or pay process.
15 The issue -- the 27, which will balloon into 56 as it
16 inevitably does which will bloom into 87 which it
17 inevitably does. And remember, they told Judge Corley
18 discovery is just getting started, is what they said,
19 four years into the case.

20 They fall into two categories, these 27 or more.
21 They've already been resolved, discussed and agreed
22 upon, one. Two, their new requests in four years have
23 never been made. And they are coming from left field,
24 right field, the dugout, the saloon down the street into
25 the ballpark for the first time weeks -- days, a month

1 before the substantial completion cutoff. So that is
2 the whack-a-mole moving forward.

3 When we go through the 27, which will be 56 by
4 time they get to you, you will see many -- most of one
5 of those two buckets, already discussed and agreed and
6 resolved and relate to requests that have never been
7 made before. And maybe we should say \$10,000 fine.

8 THE COURT: How do you figure that, Counselor
9 Snyder?

10 MR. MELAMED: May I respond?

11 MR. SNYDER: Anyone who brings to you a \$100,000
12 fine, half paid by the lawyers and half paid by the
13 client, I'm kind of making it up, if they raise issues
14 that have already been litigated and requests never
15 made, let's see how fast that list of 27 after it
16 balloons to 56 comes down to five.

17 MR. MELAMED: I have an idea.

18 THE COURT: Time out. Time out. Counselor
19 Loeser -- Counselor Melamed and Counselor Loeser, I am
20 happy to hear you, but I promised Counselor Stein next,
21 and I am going to honor that, and then Counselor Stein
22 and then Counsel Melamed. But I feel like this is sort
23 of devolving, and I will entertain the remaining three
24 comments, and then I am going to weigh in here. But I
25 appreciate, Counselor Snyder, your frustration --

1 proposing solutions here.

2 He referred to the list of issues, the 27 current
3 issues as either reflecting issues that have already
4 been litigated and resolved or never having been raised
5 first. Some of those 27 issues are issues that Facebook
6 raised; it is a joint submission.

7 Of the issues the Plaintiffs raised they include
8 a number of issues related to non-custodial ESI.
9 Non-custodial ESI, he is correct, it has been raised.
10 It was raised I believe at the first discovery
11 mediation. It was raised in meet and confers years ago.
12 And they have not been resolved.

13 We do not have a binary answer whether Facebook
14 is willing to consider production from these
15 non-custodial sources and if so, how they will do that.
16 And if not, then we would have impasse. So that
17 includes things like the capabilities log where you sat
18 in -- sorry, capabilities tool where you sat in on a
19 deposition where a deponent described how that was used
20 and that that reported things like the white-listed
21 capabilities to which entities were provided.

22 It includes the non-custodial internal financial
23 systems where to date Facebook has produced one-off
24 selective documents related to monetization of user
25 information. So I don't expect them to agree on our

1 position on this necessarily. I just want to correct
2 the record to say that these are not issues that have
3 been raised and resolved, nor are they new issues. They
4 are issues that have been raised and raised continuously
5 by Plaintiffs and not yet resolved.

6 MR. SNYDER: That is my point.

7 THE COURT: Counselor Snyder, Counselor Snyder.
8 I appreciate it, but it's Counselor Loeser's turn and
9 then I will give you the last and then --

10 MR. SNYDER: 30 seconds. After he goes I have 30
11 seconds. That's all.

12 THE COURT: Okay. Counsel Loeser -- I'm sorry.
13 Counsel Melamed. Were you done? Apologies.

14 MR. MELAMED: No worries. I have nothing more.
15 Thank you.

16 MR. ROBERTS: It is important in these
17 conferences to try to make them useful. There is a
18 court reporter, so it is important that the record be
19 accurate. The problem I have with a lot of what
20 Mr. Snyder is saying is that it is just so departed from
21 the reality.

22 I understand his frustration if we file a bunch
23 of motions to compel and they were unfounded and they
24 were baseless, and he wanted to seek fees because we
25 bothered. But we filed something like eight of them,

1 departed-from-reality version which violated your
2 directive, but I am used to it by now and it is humorous
3 by this point. I will just say prior counsel's comments
4 prove our exact point for requesting this conference.
5 He acknowledged and admitted that years ago they raised
6 this non-custodial ESI point. They raised it in
7 mediation. But guess what they didn't do? They didn't
8 make a motion.

9 And now eight days before the substantial
10 completion date they want, I guess, to tee it up to you
11 sometime in February or March. I don't know when. No
12 mas. They've had years to move on that. They didn't.
13 Strike three.

14 MR. MELAMED: To be clear, we attempted to move
15 on this back in the spring.

16 MR. SNYDER: Let me finish, please. This is my
17 point. They've got hundreds of issues on the board. At
18 some point you have to call it. They didn't call it.
19 You should. And I am happy to take make the motion.
20 Tell them no mas, you had years to bring this. You
21 didn't. That is the first point.

22 The second point, just for the record, my job is
23 not to keep documents away from them. My job is to
24 comply with Judge Corley's order and get this case
25 resolved on the merits. And in the process we produced